No. 85-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF RIVERSIDE,
LINFORD L. RICHARDSON, MICHAEL S. WATTS,
DAN PETERS, GERALD MILLER, and ROBERT PLAIT,
Petitioners,

v.

SANTOS RIVERA, JENNIE RIVERA,
DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA,
MARK LARABEE, ENRIQUE FLORES, and
MANUAL FLORES, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the consent of the parties. Statements of Consent have been submitted to the Clerk of the Court. This brief urges that the decision of the Ninth Circuit Court of Appeals be reversed, and thus supports the position of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations which themselves have hundreds of employer members with a common interest in the foregoing purposes. The Council's governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO). Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The issue before the Court in this case involves the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. One of the statutes covered by Section 1988 is 42 U.S.C. § 1981, which often is used as a basis for lawsuits challenging employment practices. Moreover, the fee-shifting provisions of Section 1988 and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), contain virtually the same language and have been given similar interpretations by the courts. The manner in which the Court interprets Section 1988 in the instant case, therefore, will have an important impact on the availability and scope of attorney's fee awards in employment discrimination litigation. Because substantially all of EEAC's members, or their constituents, are subject to the attorney's fees provisions of both Section 1988

and Title VII, those members have a direct interest in the outcome of this case.

Motivated by its concern for how Section 1988 and similar attorney's fee provisions are interpreted, EEAC has filed amicus curiae briefs in this Court in *Evans v. Jeff D.*, No. 84-1288 (concerning the simultaneous negotiation of attorney's fees and the merits in civil rights class actions); *Marek v. Chesny*, 105 S. Ct. 3012 (1985) (concerning the interplay between Section 1988 and Fed. R. Civ. P. 68); *Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923 (1985) (concerning whether Section 1988 authorizes the recovery of attorney's fees incurred in optional state administrative proceedings); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (concerning whether a partially successful plaintiff may recover attorney's fees under Section 1988 for legal services on unsuccessful claims); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (concerning the proper standard to be used in deciding whether to award attorney's fees to a successful defendant in a Title VII action). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The question presented by this case is whether the amount of attorney's fees awarded to respondents is sufficiently related to their limited success in the underlying lawsuit to be "reasonable" within the meaning of 42 U.S.C. § 1988. The issue arises from an action filed by respondents against the City of Riverside, its police chief, and 30 police officers, alleging that the police committed various civil rights violations and other torts in handling

a disturbance in a predominantly Latino section of Riverside.[1] To redress the alleged violations, respondents sought both monetary damages and injunctive and declaratory relief. In addition, they sought the attorney's fees that are the subject of the instant case.

Before the case went to trial, respondents abandoned their original claim that the police officers had acted with discriminatory intent and they dropped their request for declaratory and injunctive relief. Also before trial, 17 of the individual defendants were dismissed on motions for summary judgment. The jury exonerated another 9 of the defendants at the close of the trial, finding only 6 (the City and 5 individuals, hereinafter "petitioners") of the original 32 defendants liable. Of the 19 original substantive claims, the jury found only 3 to be meritorious—the claim alleging a § 1983 violation, and the claims alleging negligence and false arrest and imprisonment. Although the jury awarded $33,350 in individual damages, respondents obtained no other monetary or injunctive relief, and no changes in police policy resulted from the litigation.

After the trial, respondents filed a motion requesting attorney's fees in the amount of $245,456.25, which the trial court granted in full. *See* Petition for Writ of Certiorari (hereinafter Pet. Cert.), Appendix 6. The Court of Appeals for the Ninth Circuit affirmed the award of attorney's fees, *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), and petitioners sought review in this Court. This Court granted the petition for certiorari, vacated the fee award, and remanded for re-

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[1] Specifically, the suit alleged violations of the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, violations of 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986, and pendant state claims for conspiracy, emotional distress, assault and battery, bodily injury, property damage, breaking and entering a residence, malicious prosecution, defamation, false arrest and imprisonment, lost wages, and negligence.

consideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *City of Riverside v. Rivera*, 461 U.S. 952 (1983).

The district court on remand reinstituted its prior ruling, again granting the full $245,456.25 in requested fees. *See* Pet. Cert., Appendix 2. The court found that on the "central and most important issue" of "whether there was police misconduct committed by and condoned by defendants," respondents had prevailed. *Id.* at 2-6. Moreover, the court found, all of respondents' original claims were "closely related," so that "time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." *Id.* at 2-6 - 2-7. The court therefore concluded that "the total number of hours expended by counsel" was a proper basis for determining the fee award and that the full amount requested was "justified in light of the substantial success achieved." *Id.* at 2-12.

On appeal, the Ninth Circuit again affirmed the $245,456.25 fee award, this time in an unreported opinion. *See* Pet. Cert., Appendix 1. The circuit court agreed that respondents had "succeeded on the most significant issue of the litigation," *id.* at 1-4, and that the respondents' attorneys "spent no time on claims unrelated to the successful claims." *Id.* at 1-6. The court therefore upheld the district court's conclusion that there was "a reasonable relationship" between the degree of success obtained and the amount of the fee award. *Id.* at 1-7. Finally, the court of appeals rejected "the proposition that there need be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded." *Id.* at 1-8 - 1-9.

With the full fee award still in place, petitioners again sought review in this Court and a writ of certiorari was granted. *City of Riverside v. Rivera*, 106 S.Ct. 244 (1985). In addition, Justice Rehnquist granted petitioners' application for a stay of the Ninth Circuit's

mandate to pay the award. In an opinion accompanying that grant, Justice Rehnquist suggested that this case presents the "significant question" under Section 1988 of whether "a court, in determining the amount of a 'reasonable attorney's fee' under the statute, [should] consider the amount of monetary damages recovered in the underlying action." *City of Riverside v. Rivera*, 106 S.Ct. 5, 6 (1985).

SUMMARY OF ARGUMENT

The Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes the award of "a *reasonable* attorney's fee" (emphasis added) to the prevailing party in a civil rights action. In determining the amount of a fee award, the lower courts must be guided by the standards that Congress and this Court have adopted for ensuring that the fee is in fact "reasonable." The initial stage of the fee determination process is the "lodestar" calculation—the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. In making this calculation, the court must not include hours that are excessive, redundant, or otherwise unnecessary. The court must also temper its calculation by the standards of "billing judgment" that generally govern the fee-setting process in the private sector. The lodestar figure should reflect only those hours and rates that an attorney could properly bill to a client. By simply awarding fees for *all* of the time respondents' attorneys expended on the instant case, the courts below failed to observe these principles.

When awarding fees to a plaintiff who has achieved only limited success, the court often must make a downward adjustment of the lodestar figure. Under *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), fees awarded to a partially successful plaintiff must be "reasonable in relation to the results obtained" in the underlying lawsuit. There are two methods for adjusting the lodestar to arrive at a figure that meets this requirement. The

court may either deny fees for time spent on unsuccessful claims that are unrelated to the successful ones or, where all of the claims are related, it may simply reduce the award to reflect the results obtained. Both approaches have the effect of requiring that the amount of the fee award bear a reasonable relationship to the extent of the plaintiff's success. In a case such as this one, where the *only* relief obtained is monetary damages, the determination of whether a fee award is reasonable within the meaning of Section 1988 can best be achieved by requiring the amount of the fee award to bear some reasonable relationship to the amount of the damages award. The courts below made no reduction in the lodestar, and the resulting fee award is so vastly disproportional to the degree of respondents' success as to be unreasonable under Section 1988.

The underlying policies of Section 1988 support a rule that explicitly requires fees awarded to a partially successful plaintiff to bear a reasonable relationship to the plaintiff's success. Congress enacted Section 1988 to promote the vindication of our civil rights policies by facilitating the litigation of meritorious claims. By allowing only a plaintiff who has "prevailed" to receive fees, Congress sought to ensure that Section 1988 would benefit only litigants who actually do vindicate those policies. Congress also sought, however, to avoid the award of "windfall" attorney's fees. This Court has recognized that to achieve the proper balance between these policies when awarding attorney's fees to a partially successful plaintiff, it is necessary to focus on the degree of the plaintiff's success. The degree of success must be the focus, because an award of fees for all time spent on a lawsuit would encourage excessive litigation of claims that, although "related" to the successful claims, have little chance of success. In turn, attorneys would receive "windfall" fees far out of proportion to the limited success they achieve for their clients. An explicit propor-

tionality requirement would further reduce the incentive for such excessive litigation, but would still reward litigants who vindicate our civil rights policies.

ARGUMENT

I. THE ATTORNEY'S FEES AWARDED IN THIS CASE ARE NOT REASONABLE WITHIN THE MEANING OF SECTION 1988 BECAUSE THEY COMPENSATE TIME SPENT ON UNSUCCESSFUL CLAIMS THAT ARE UNRELATED TO THE SUCCESSFUL CLAIMS AND BECAUSE THEY DO NOT BEAR A REASONABLE RELATIONSHIP TO RESPONDENTS' LIMITED SUCCESS IN THE UNDERLYING LAWSUIT.

Although the respondents obtained only limited monetary relief on the merits of their claims and neither obtained injunctive relief nor caused the petitioners to change any of their practices, the lower courts awarded the *entire* fee requested by respondents. EEAC takes no position on what the precise amount of the fee award in this case should be, but submits that the lower courts' award is not reasonable within the meaning of Section 1988 [2] because it does not bear a reasonable relationship to respondents' limited success. In failing to exercise the required "billing judgment," and in not limiting the amount of the fee award commensurate with respondents' success, the lower courts acted contrary to both the policies underlying Section 1988 and this Court's prior decisions.

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[2] 42 U.S.C. § 1988 states in pertinent part:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a *reasonable* attorney's fee as part of the costs. (Emphasis added).

A. The Lodestar Figure Was Not Properly Calculated In This Case Because The Lower Courts Did Not Exercise Prudent Billing Judgment And Did Not Carefully Examine The Hours Submitted For Excessive Or Redundant Time.

The Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is a fee-shifting provision that permits the court in a civil rights action to award "a reasonable attorney's fee" to the "prevailing party" as part of the costs assessed against the other party. This Court held in *Hensley v. Eckerhart* that fees awarded under this provision to a plaintiff who achieves only limited success must be "reasonable in relation to the results obtained." 461 U.S. 424, 440 (1983). In addition, the Court in *Hensley* emphasized that "[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole.*" *Id.* at 440 (emphasis added). For a plaintiff who has achieved limited success in the underlying lawsuit, therefore, a "reasonable" attorney's fee under Section 1988 is one that bears a reasonable relationship to the extent of the plaintiff's success.

The starting point for making the fee determination is the lodestar figure, arrived at by multiplying "the number of hours *reasonably* expended on the litigation . . . by a *reasonable* hourly rate." *Hensley*, 461 U.S. at 433 (emphasis added); *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). In making this calculation, the district court is required to exclude hours not reasonably expended by the fee applicant's attorneys.[3] Reductions

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[3] The party seeking a fee award is required to submit evidence supporting the hours claimed. This Court has ruled that "[w]here the documentation of hours is inadequate, the district court *may* reduce the award accordingly." *Hensley v. Eckerhart*, 461 U.S. at 433 (emphasis added). The First Circuit, moreover, has held that "the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in

must be made for overstaffing, for variations in the skill and experience of lawyers, and for excessive, redundant, or otherwise unnecessary time. *Hensley*, 461 U.S. at 434; *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). This Court has also emphasized that the lodestar calculation should be tempered by the same "billing judgment" that is an important component of fee setting in the private sector. *Hensley*, 461 U.S. at 434; *see also Ramos*, 713 F.2d at 555. Both counsel for the prevailing party and the court that is making the fee determination must ensure that hours which would not properly be billed to a *client* are not charged to an *adversary* in calculating the lodestar. *Hensley*, 461 U.S. at 434, *quoting Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original); *Ramos*, 713 F.2d at 553.

The courts below did not follow these well recognized principles, but rather gave wholesale approval to the full fee request and ruled that *all* of the time spent on the

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any [fee] award or, in egregious cases, disallowance." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984). The Tenth, Second, and District of Columbia Circuits have imposed similar requirements. *See Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) (requiring "meticulous, contemporaneous time records" of "all hours for which compensation is requested and how those hours were allotted to specific tasks"); *New York Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983) (making contemporaneous time records a *prerequisite* for attorney's fees in the Second Circuit); *National Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (requiring contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney"). To ensure greater accuracy in determining "a reasonable attorney's fee" in future cases, EEAC urges this Court to follow these decisions and expressly to require detailed, contemporaneous time records as a prerequisite to a fee award.

If the records submitted by respondents' attorneys in the instant case are not contemporaneous (and there is no evidence in the record that they are), a downward adjustment in the fee award should be made. *Hensley*, 461 U.S. at 433.

case was a proper basis for determining the fee award. The transcript of the original proceedings on the motion for attorney's fees makes abundantly clear that the district court was predisposed, even before receiving any time records, to grant "substantial attorneys fees" for whatever time the attorneys submitted. *See* Pet. Cert. at 32-33. Likewise, on remand for reconsideration in light of *Hensley*, the district court judge stated that the remand was only for the purpose of allowing that court to give "some more findings" to support its original award. *See* Pet. Cert., Appendix 15 at 15-4 - 15-5. The Ninth Circuit found no fault with the district court's approach on either occasion.

In a case such as this—involving the work of 2 attorneys and 2 law clerks over a five year period—it is inconceivable that there was not a single "excessive, redundant, or otherwise unnecessary" hour of work. *See Hensley*, 461 U.S. at 434; *Grendel's Den, Inc.*, 749 F.2d at 950. It is equally unlikely that a prudent exercise of billing judgment would not result in at least some reduction of the total time spent on the case. The Tenth Circuit has required that district courts making the lodestar calculation carefully examine whether specific tasks would normally be billed to a paying client and whether the number of hours spent on each task is reasonable. *Ramos*, 713 F.2d at 554. The district court in *Wabasha v. Solem*, 580 F. Supp. 448 (D. S.D. 1984), recognized that the amount of time actually expended on each task may not be "reasonable" for attorney's fees purposes, and the court reduced the requested hours accordingly. *Id.* 458-59. By not observing these principles in this case, the lower courts failed to arrive at "the number of hours reasonably expended on the litigation."

Having decided that *all* of respondents' attorneys' time should be compensated, the district court, affirmed by the court of appeals, calculated the lodestar based on rates of $125.00 per hour for the attorneys and $25.00 per hour for the law clerks. The EEAC takes no posi-

tion on whether these rates were reasonable, but even if they were, the lower court's calculation produced an unreasonable attorney's fee because the court had already decided to compensate an excessive number of hours. The court then committed the additional error of not moving beyond the lodestar to the next stage of the fee determination process.

B. The Lower Courts Erred In Not Reducing The Lodestar To Account For Respondents' Limited Success In The Underlying Lawsuit.

Although a proper lodestar calculation normally will provide the "reasonable" attorney's fee contemplated by Section 1988, there may be circumstances in which that basic standard "results in a fee that is either unreasonably low or unreasonably high." *Blum v. Stenson*, 104 S.Ct. 1541, 1548 (1984). A further inquiry must be made, therefore, into whether an upward or downward adjustment of the lodestar is necessary. *Hensley*, 461 U.S. at 434. The relevant considerations for determining a fee award are listed in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974), which Congress endorsed when it enacted Section 1988.[4] S. Rep. No. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5908, 5913.

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[4] The twelve considerations listed in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) *the amount involved and the results obtained*; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19 (emphasis added).

Significantly, the House Report on Section 1988 specifically highlighted "the amount received in damages, if any," as a factor in determining the amount of fees to be awarded. H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 8 (1976).

This Court recognized in *Blum* that many of the *Johnson* factors will be subsumed into the lodestar calculation itself. 104 S.Ct. at 1548-49. For example, the number of billable hours recorded will reflect the novelty and complexity of the issues, while the reasonableness of the hourly rates will reflect the experience and skill of the attorneys and the quality of their representation. *Id.*; *see also Rybicki v. State Board of Elections of State of Illinois*, 584 F. Supp. 849, 858-59, 863 (N.D. Ill. 1984) (complexity of case and quality of representation reflected in the elements of the lodestar calculation); *Wabasha*, 580 F. Supp. at 463 (level of attorney's skill is compensated in the "reasonable hourly rate"). In determining whether an adjustment of the lodestar should be made for fees awarded to a partially successful plaintiff, "*the most critical factor* is the degree of success obtained." *Hensley*, 461 U.S. at 436 (emphasis added); *Blum*, 104 S.Ct. at 1549.

The Court in *Hensley* established two methods for ensuring that fees awarded to a partially successful plaintiff will in fact reflect the degree of success obtained by that plaintiff. The first approach focuses on whether the plaintiff failed to prevail on claims that are *unrelated* to the claims which succeeded. If a lawsuit raises claims for relief that are "based on different facts and legal theories," the attorney's work on one claim will be unrelated to work on another. *Hensley*, 461 U.S. at 434. This will be true "even where the claims are brought against the same defendants—often an institution and its officers, as in this case." *Id.* at 434-35. In these circumstances, work on the unsuccessful, unrelated claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 435, *quoting Davis v. County of Los Angeles*, 8 E.P.D. Par. 9444, at 5049 (C.D. Cal. 1974). "The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in

separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435; *see also Smith v. Robinson*, 104 S.Ct. 3457, 3466 (1984) (fees are not properly awarded for the time spent on unsuccessful claims that are different from the claims on the basis of which relief was granted).

In *Smith v. Robinson*, this Court characterized *Hensley*'s discussion of the relatedness of claims as requiring "that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success." 104 S.Ct. at 3467. District courts are "charged with the responsibility, imposed by Congress, of evaluating the award requested in light of the relationship between particular claims for which work is done and the plaintiff's success." *Id.* Most federal courts have accepted this responsibility and have limited fee awards for partially successful plaintiffs accordingly. *See, e.g., Gates v. ITT Continental Baking Co.*, 581 F. Supp. 204, 211 (N.D. Ohio 1984) (awarding fees for time spent on claims of employment discrimination under Title VII and 42 U.S.C. § 1981, but denying fees for time spent on claims under 42 U.S.C. §§ 1983 and 1985 and a claim for a willful violation which would have entitled the plaintiff to punitive damages); *Oriental Federal Savings and Loan Assoc. of Puerto Rico v. Cardona*, 580 F. Supp. 784 (D. P.R. 1984).

In the instant case, respondents alleged four separate constitutional violations, four separate federal statutory violations, and eleven different tort violations under state law. Only 3 of these 19 claims were successful. The lower courts, however, did not carry out their mandate to evaluate the requested fee award in light of the relationship between each claim and the plaintiff's ultimate success. Rather, the district court summarily ruled that all of the claims were "closely related," while the Ninth Circuit concluded that respondents' attorneys "spent no time on claims unrelated to the successful

claims." Much more careful scrutiny than this is required. Had the courts below exercised that scrutiny, they would have seen that many of the unsuccessful claims are clearly unrelated to those which succeeded.

The claims for property damage, breaking and entering a residence, and lost wages, for example, are not sufficiently "related" to any of the successful claims (under Section 1983 and for negligence and false arrest)[5] because they clearly are based on distinct underlying legal theories. Different elements of proof must be established to succeed on each of these claims. As the Court of Appeals for the First Circuit has held, attorney's fees should not be granted for time spent litigating claims that rest "on legal theories distinct from those upon which appellant prevailed." *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984). The Eighth Circuit has observed that an affirmative action claim and a retaliation claim alleged in an employment discrimination action are not "related" because "[t]he legal underpinnings of the two theories are largely distinct." *Sisco v. J.S. Alberici Construction Company, Inc.*, 733 F.2d 55, 59 (8th Cir. 1984). Many of the unsuccessful claims alleged by respondents rest on legal theories that are different from those on which they prevailed and attorney's fees should not have been awarded for time spent on those unsuccessful claims.

The courts below also erred in awarding fees to respondents' attorneys for time spent on claims against the 17 defendants who were dismissed from the case on motions for summary judgment. For attorney's fee purposes, these claims are not "related" to the successful claims against the remaining defendants. *See Neal by*

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[5] To the extent that work done on even the successful negligence and false arrest claims can be separated from work done on the Section 1983 claim, the Respondents' fees should be reduced. Such state law claims, of course, do not fall within the fee provision of Section 1988.

Neal v. Berman, 576 F. Supp. 1250, 1252 (E.D. Mich. 1983). Nor should the time spent defending the successful motions for summary judgment themselves be compensated. *Id.* The lower courts should have reduced the requested fee award to account for the time spent on these aspects of the case. As these examples show, respondents' attorneys expended considerable time on this case that was not "reasonably related to [their] ultimate success." *Smith*, 104 S.Ct. at 3467. Reductions in the amount of the requested fee award, therefore, were clearly warranted and should have been made. *Hensley*, 461 U.S. at 435.

Even if the courts below did not err in finding that the unsuccessful claims were "related" and thus compensable, the fee award should have been reduced based on the second method that *Hensley* provides for arriving at a fee award that reflects the degree of the plaintiff's success. This second approach is appropriate where all of the claims in a case "involve a common core of facts or [are] based on related legal theories." *Id.* "Such a lawsuit cannot be viewed as a series of discrete claims" and "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

If the plaintiff "has achieved only partial or limited success," the lodestar figure (the product of hours reasonably expended times a reasonable hourly rate) may be excessive and a downward adjustment will be necessary. *Id.* at 436. "*This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.*" *Id.* Whether the district court accounts for the plaintiff's limited success by identifying specific hours to be eliminated or by making a flat reduction of the lodestar amount, "the most critical factor is the degree of success obtained." *Id.* at 436-37.

In the instant case, the district court, affirmed by the court of appeals, found that "time devoted to claims on

which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." Even if that finding were correct, it would not justify the court's conclusion that a reduction in the requested fee award was unnecessary. *Hensley* explicitly recognized that it will sometimes be "difficult to divide the hours expended on a claim-by-claim basis," and that an alternative approach to adjusting the fee award will be necessary. *Id.* at 435. That is why the district courts are instructed to "focus on the significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation" when all of the claims are related." *Id.* at 435.

In *Wabasha*, where the attorneys' time records did not permit a clear differentiation of the time spent on each of the plaintiff's legal theories, the court resorted to this alternative approach and ordered a 40 percent reduction in the lodestar because "the results obtained, although significant, were limited in nature and fell far short of the original goal." 580 F. Supp. at 464-65. The results obtained by respondents (success on 3 of 19 claims; 6 of 32 defendants found liable; no injunctive relief and no changes in petitioners' practices) are also clearly "limited" and "far short of the original goal." A reduction in the requested fee award, therefore, is clearly warranted.

Whether it is by denying fees for time spent on unsuccessful claims that are unrelated to the successful ones, or by reducing the lodestar for the plaintiff whose claims are related but who has achieved limited success, *Hensley* makes clear that fees awarded to a partially successful plaintiff must be closely tied to the extent of the plaintiff's success. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440. In the instant case, where the *only* relief obtained was a relatively small damage award and no

injunction or changes in policy or other benefits resulted from the litigation, the extent of the respondents' success was clearly "limited in comparison to the scope of the litigation as a whole." This Court, therefore, should require that the amount of the attorney's fees awarded here bear a reasonable relationship to the damage award. By awarding fees that are so enormously disproportional to respondents' limited success, the courts below went far beyond the boundaries of the "reasonable attorney's fee" that Section 1988 permits.[6]

II. THE POLICIES BEHIND SECTION 1988 SUPPORT A RULE THAT REQUIRES ATTORNEY'S FEES AWARDED TO A PARTIALLY SUCCESSFUL PLAINTIFF TO BEAR A REASONABLE RELATIONSHIP TO THE LIMITED SUCCESS OBTAINED IN THE UNDERLYING LAWSUIT.

The primary policy underlying the fee-shifting provision of Section 1988 is a desire to promote the vindication of the civil rights of individuals by facilitating the litigation of meritorious claims. S. Rep. No. 1011 at 2-5, 1976 U.S. Code Cong. & Ad. News at 5909-13; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). This must not be misinterpreted as simply a general desire to foster more litigation. Congress intended to encourage "good faith actions" that would vindicate our civil rights policies. S. Rep. No. 1011 at 5, 1976 U.S. Code Cong. & Ad. News at 5912. By allowing only a plaintiff who has "prevailed" in such an action to receive fees, Congress sought to ensure that the benefits of Section 1988 would be limited to those litigants who actually do vindicate those policies. As this Court observed in *Christiansburg*

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[6] To the extent that certain courts have held or implied that a court is not even permitted to consider the amount of damages in calculating a fee award, *see DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985); *Ramos v. Lamm*, 713 F.2d at 557, such decisions should be rejected as contrary to the legislative history of Section 1988 and to prior decisions of this Court, as noted above.

Garment Co. v. EEOC, "when a district court awards counsel fees to a *prevailing* plaintiff, it is awarding them against a violator of federal law." 434 U.S. 412, 418 (1978) (emphasis added).

Where a plaintiff has not "prevailed," and thus where no violation has been demonstrated, there is no justification for an award of fees because no right has been vindicated. Likewise, where several violations are alleged, but only one or a few are proved, there is no justification for awarding more than the fees related to the proven violations. A partially successful plaintiff who seeks attorney's fees for time spent on an unsuccessful challenge to a lawful practice is not cloaked in the mantle of public interest on that claim, and thus the policy reasons that generally support an award of fees to the plaintiff are not present.

In addition to allowing awards of attorney's fees *to* prevailing plaintiffs, Congress also authorized fee awards *against* plaintiffs who litigate in "bad faith" under the guise of enforcing Federal rights. S. Rep. No. 1011 at 5, 1976 U.S. Code Cong. & Ad. News at 5912; *see also Christiansburg Garment Co.*, 434 U.S 412. Moreover, the standards that Congress adopted for determining the amount of the fee award are intended to result "in fees which are adequate to attract competent counsel, *but which do not produce windfalls to attorneys.*" S. Rep. No. 1011 at 6, 1976 U.S. Code Cong. & Ad. News at 5913; *see also* H.R. Rep. No. 1558 at 6 (emphasis added). The Fifth Circuit decision cited by Congress as containing the proper standards to be employed in awarding attorney's fees explicitly states that the Title VII fee-shifting provision after which Section 1988 is patterned was not "passed for the benefit of attorneys" and should not be used "to make the prevailing counsel rich." *Johnson*, 488 F.2d at 719; *see also Stanford Daily v. Zurcher*, 64 F.R.D. 680, 687 (N.D. Cal. 1974) (also cited by Congress, the opinion adopts a standard that "at-

tempts to avoid any unreasonable enrichment of the attorneys who ask the court for fees").

Other federal courts have recognized Congress' clear intent that Section 1988 not serve as the vehicle for awarding "windfall" attorney's fees. *See, e.g., Grendel's Den, Inc.*, 749 F.2d at 950; *New York Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139, 1149, 1150 (2d Cir. 1983). Thus, while Section 1988's primary purpose is to increase access to the judicial system to advance fundamental public policies, the statute embodies the additional goal of avoiding unwarranted or excessive attorney's fees.

It is especially difficult to strike the proper balance between these conflicting policies when awarding fees to a plaintiff who has achieved only partial success in the underlying litigation. There is a distinct danger in such cases that the award of excessive fees based on the full scope of litigation that ultimately failed in many respects, may result in a windfall to the plaintiff's attorney and may encourage excessive litigation of questionable or unnecessary claims. It was to avoid this result that this Court held in *Hensley* that the fee award for a partially successful plaintiff must be "reasonable in relation to the results obtained," 461 U.S. at 440, and that "the most critical factor" in determining the amount of the award "is the degree of success obtained." *Id.* at 436. This emphasis on the degree of the plaintiff's success ensures that attorney's fees will be awarded only to the extent that the plaintiff has vindicated some important public policy and thus has fulfilled the purpose of Section 1988.

As discussed above, this Court observed in *Hensley* that "[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole.*" *Id.* at 440 (emphasis added). The Court stopped short of explicitly requiring

that the fee award be "proportional" to the relief obtained. In cases such as this, however, where only damages are involved, the EEAC submits that the adoption of a requirement that fees bear a reasonable relationship to the amount of damages recovered would better ensure the relationship between the fee award and the plaintiff's degree of success that *Hensley* recognized as being necessary to fulfill the purposes of Section 1988.

In *Christiansburg Garment Co.*, this Court suggested that awarding fees only to *prevailing* plaintiffs would not in itself be an incentive for plaintiffs to bring claims that have little chance of success. 434 U.S. at 422. For the plaintiff who is deemed "prevailing" even though he or she has achieved limited success, however, this will be true only if there is a requirement of some reasonable degree of proportionality between the amount of the fee award and the relief obtained.

A plaintiff's attorney knows that succeeding on any significant civil rights claim will qualify the plaintiff as a "prevailing party" and in most cases will entitle the plaintiff to some amount of attorney's fees. *See Hensley*, 461 U.S. at 433. If there is a possibility that the court may award fees for time spent on *un*successful claims on the grounds that they are "related" to the successful ones or are derived from a "common core of facts," *id.* at 435, there is a strong incentive for the attorney to allege such claims despite their marginal chances of success. The attorney may be willing to gamble that the district court will read *Hensley* as permitting an award of fees for time spent on all of the claims. That is precisely what the lower courts in the instant case did, awarding respondents' attorneys a substantial windfall for their limited success. A requirement that the amount of the fee award must bear some reasonable relationship to the plaintiff's degree of success would clarify *Hensley*, however, and would remove any incentive to allege numerous claims that, although minimally "related," have little or no

chance of success. Consequently "windfall" attorney's fees would be avoided.

In addition, such a requirement would relieve defendants of the burden of having to pay the full costs of *both* sides of a case in which multiple unnecessary claims have been alleged. As a matter of fundamental fairness, defendants should not be required to finance the plaintiff's costs of excessive and over-zealous litigation of claims that prove to be unmeritorious as well as bearing their own defense costs. Even where some of a defendant's actions ultimately are proven to be unlawful, the defendant should not be forced to suffer the additional penalty of paying for a plaintiff's unnecessary claims.

This Court established in *Blum* that the lodestar calculation alone will normally provide a "reasonable" attorney's fee outside the context of the partially successful plaintiff, and that an upward adjustment of that figure will be justified only "in the rare case." 104 S.Ct. at 1548, 1550 n. 18; *see also Hensley*, 461 U.S. at 435 (an enhanced fee award may be justified "in some cases of exceptional success"). Thus, the proportionality requirement urged here would not mean that the amount of attorney's fees must be *directly* proportional to the amount of damages or other relief awarded. Rather, this requirement merely would provide the district courts with clearer guidance when making downward adjustments of the lodestar to account for a plaintiff's limited success. Because the Court's decision in this case will affect the interpretation and application of a variety of other attorney's fees provisions, any clarification that can be achieved here could greatly reduce the considerable stream of attorney's fees litigation that has engulfed the federal courts.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Ninth Circuit decision be reversed and the case be remanded to the district court for the determination of a fee award that bears a reasonable relationship to the limited success obtained in the underlying lawsuit.

Respectfully submitted,

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